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In the Supreme Court of the United States

October Term, 1949

No.....

WILLIAM TURPIN, JR.,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin entered July 12th, 1949, affirming an order of the Circuit Court of the County of Richland, State of Wisconsin, denying a motion for a writ of error *coram nobis* to set aside a conviction of petitioner for the crimes of grand larceny of an automobile and unlawful use of an automobile by his plea of guilty entered August 22nd, 1945 in the County Court of the County of Richland, State of Wisconsin.

OPINIONS BELOW

State of Wisconsin. Richland County. County Court.

State of Wisconsin, Plaintiff,

vs.

William Turpin, Jr., Defendant.

DECISION ON APPLICATION FOR WRIT OF *Coram Nobis*

Petitioner concedes that a writ of error *coram nobis* should be granted with the utmost caution and only in cases where it quite clearly appears that, an error having existed before judgment, but for such error the judgment would not have been entered.

This is a case where the defendant, who must have known his fundamental rights, having served for a considerable period in the army and who spoke and presumably understood the English language. He was arrested with a 15-year old boy and charged with the larceny of an automobile and operating the same without the owner's consent. The affidavit of the then sheriff of Richland County shows that the defendant repeatly admitted that he was the instigator of the crime, and that the 15-year old minor consented to go along with him on the promise that he would be given a trip to the east—the defendant living in New York.

The judge who then presided is dead, and so there is no affidavit from him to show what was said and done.

Going back to the rule for the granting of a writ of error *coram nobis*, what error of fact is there but for which

error the judgment would not have been entered? Frankly, the Court sees none. It is claimed that counsel was not tendered him, but it cannot be assumed that if counsel had been tendered him there would have been no plea or guilty or conviction.

The writ of *coram nobis* is a common law remedy afforded on application to the trial court for the correction of an error of fact unknown at the time of the trial to the party seeking relief and *to the court.*

> *State ex rel. Mitchell v. Surndall, etc.*, (Ok.) 241 Pac. 456, 458.
>
> *Alexander v. State* (Wyoming), 123 Pac. 68.
>
> *Ernest v. the State*, 179 Wis. 646.

Certainly the failure to appoint counsel was not an error of fact unknown to the applicant and unknown to the court. The unvarying gist of the writ of *coram nobis* is mistake or lack of knowledge of facts inhering in the judgment itself.

> *Alexander v. State, supra.*
>
> *Dobbe v. State* (Kan.), 65 Pac. 658.
>
> *Holt v. State* (Miss.), 29 So. 527.

Its principal aim is to afford the court in which an action was tried an opportunity to correct its own record with reference to a vital fact not known when the judgment was rendered.

> *Lamb v. State* (Fla.), 107 So. 535, 537, 538.

The defendant is not in custody in Wisconsin. He may never again be in custody here. Under these circumstances should this extraordinary writ be allowed? This Court believes not. If the defendant is ever again in custody in Wisconsin in this case or any other, this question can be raised by *habeas corpus*.

This court does not feel that the applicant has brought himself within the rules for a writ of error *coram nobis* and the application is denied.

The attorney for the state may prepare formal order to that effect, sending a copy to the attorney for the applicant when forwarding the original to the Court for signature.

Dated January 4, 1949.

A. W. KOPP,
Circuit Judge.

FILED Jul 12 1949
ARTHUR A. McLEOD, Clerk of Supreme Court
Madison, Wis.

State No. 25 August Term, 1948

STATE OF WISCONSIN: IN SUPREME COURT

State of Wisconsin, Respondent,

v.

William Turpin, Jr., Appellant.

APPEAL from an order of the circuit court for Richland county: A. W. Kopp, Circuit Judge. *Affirmed.*

The motion was made in the county court for Richland county by William Turpin, Jr. for writ of error *coram nobis*. The county court deeming himself disqualified, and the judge who originally tried the criminal case of *State of Wisconsin v. William Turpin, Jr.* having died before the motion was made, motion was transferred to the circuit court for Richland county for trial. The writ sought to set aside the conviction of Turpin for the crimes of larceny and unlawful use of an automobile. A plea of guilty was entered by appellant on August 22, 1945. Motion was entertained upon written affidavits filed by appellant and by Leo P. Lownik, district attorney, Richland county, and J. B. McClaren, former sheriff of Richland County. The circuit court on January 20, 1949 filed a written opinion and entered an order denying the writ. The applicant appeals.

HUGHES, J. A writ of error *coram nobis* is a common law remedy afforded on application to the trial court for the commission of error of fact not appearing on the record. It is not an appellate writ since it goes to the court that tried the case.

In this case appellant's affidavit shows that he was arrested on August 18, 1945 and later arraigned before a justice, charged with the larceny of an automobile and its unlawful use. It is alleged that he was not informed that a police justice or any other person had a right to obtain counsel or have counsel assigned to defend him. He was thereupon bound over to the county court, and on August 22, 1945 an information was filed in the county court charging larceny and illegal use of an automobile. It is alleged in the affidavit that at the time of his arraignment the appellant was not informed by the judge or by anybody else that he was entitled to have counsel assigned

to defend him if he was unable to secure his own counsel. The charge was read to him and he pleaded guilty to both counts on the information because, as he affirms, he supposed that since the person arrested with him had taken the automobile without permission and since he was with him at the time the automobile was taken, he was guilty even though he did not know the illegal character of his host's possession; that he had never theretofore been convicted of a crime. On his plea affiant was found guilty and ordered to serve his sentences upon the two crimes consecutively.

There were subsequent commutations and on December 12, 1946 the applicant was permitted to go to New York on parole under supervision pursuant to sec. 57.13, Stats. While in New York he was indicted in 1947 for grand larceny and his Wisconsin parole was revoked. He pleaded guilty to the New York indictment and after serving to May 11, 1949 was released on parole and his Wisconsin parole reinstated. His New York parole will not expire until September, 1951.

Failure to appoint counsel for a defendant does not always constitute violation of due process. In *Townsend v. Burke* (1948), 334 U. S. 736, 739, 68 Sup. Ct. 1252, 92 L. Ed. 1231, the supreme court said:

> "Only recently a majority of this Court reaffirmed that the due process clause of the Fourteenth Amendment does not prohibit a State from accepting a plea of guilty in a non-capital case from an uncounseled defendant. *Bute v. Illinois*, 333 U. S. 640, 68 S. Ct. 763. In that, and in earlier cases, we have indicated, however, that the disadvantage from absence of counsel, when aggravated by circumstances showing that it re-

sulted in the prisoner actually being taken advantage or, or prejudiced, does make out a case of violation of due process."

Assuming, without deciding, that the defendant's rights were violated by the acceptance of the plea of guilty without first appointing counsel or having a waiver, we are of the opinion that a writ of error *coram nobis* is not a proper remedy.

It has been held heretofore that *habeas corpus* affords a proper remedy where the time for appeal has expired. *State ex rel. Drankovich v. Murphy* (1946), 248 Wis. 433, 22 N. W. (2d) 540; *State ex rel. Wenzlaff v. Burke* (1947), 250 Wis. 525, 27 N. W. (2d) 475; *State ex rel. Lawrence v. Burke* (1948), 253 Wis. 240, 33 N. W. (2d) 242. We are of the opinion that it affords a complete remedy, and that a writ of error *coram nobis* does not therefore lie. *State v. Dingman* (1941), 238 Wis. 142, 297 N. W. 771.

The writ of error *coram nobis* is discussed at length in *In re Ernst* (1923), 179 Wis. 646, 650, 192 N. W. 65, and the conclusion there reached:

> "At the time of the adoption of the constitution the writs of error herein referred to had not been abolished but were still in existence, and while the proceedings have been regulated and modified, such writs have not been abolished. It therefore becomes plain that the common-law writ of error *coram nobis* is still in force in this state, excepting only where other remedies have been substituted."

The court then held that the application should have been made to the trial court and indicated that its issuance is not as of course but is discretionary.

For practical reasons the applicant should subject himself to the jurisdiction of the Wisconsin courts so that if he is entitled to a new trial he will be available when it is ordered. He has it within his power to surrender himself to the sheriff and sue out a writ of *habeas corpus*.

We cannot say that the trial court abused its discretion in refusing to grant the writ.

By the Court.—Order affirmed.

The affirmance in the Supreme Court of the State of Wisconsin was unanimous, Hughes, J. writing the opinion.

JURISDICTION

The jurisdiction of this court is invoked under Rule 37 (b) of the Rules of Criminal Procedure and Title 28, Section 347, United States Code.

QUESTIONS PRESENTED

(1) In this case, is not the Writ of Error *Coram Nobis* the remedy to present the question as to whether petitioner-appellant has been deprived of due process of law under the statutes and the constitution of the State of Wisconsin and the 14th Amendment of the Constitution of the United States?

(2) Did not the petitioner-appellant prove by a preponderance of evidence that he was entitled to the issuance of the writ of error *coram nobis* setting aside his convictions?

STATUTE INVOLVED

Statutes of Wisconsin
Section 357.26(2)

> Upon the arraignment and before plea, of any person charged with a Felony, he shall be advised by the Court of his right to counsel and a record shall be made of such advice upon the minutes of the Court or in a transcript of the proceedings.

PROVISIONS OF LAW INVOLVED

Constitution of the State of Wisconsin
Section 7

> Every person charged with crime shall enjoy the right to be heard by himself and counsel.

Section 8

> No person shall be held to answer for a criminal offense without due process of law.

Constitution of the United States
Fourteenth Amendment (part applicable)

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This proceeding was commenced in the County Court of the County of Richland, State of Wisconsin by serving notice of motion and affidavit of William Turpin, Jr. on the District Attorney of Richland County and filing same in the said Court. The District Attorney filed an affidavit in opposition. The motion was referred to the Circuit Court of Richland County for the reason that the County Court Judge had been contacted by petitioner's attorney before he was appointed. Subsequently the District Attorney filed additional affidavits, one by himself and one by the Sheriff in office in August, 1945.

The affidavit of petitioner, verified, shows that he was arrested about five miles from Elkhorn, Wisconsin, (which is about fifty miles from Richland Center) on August 18, 1945. He was not arraigned before a Police Justice in Richland Center until August 20th, 1945. On August 20th, 1945, on his arraignment before the said Justice, he was charged in a complaint with the larceny of an automobile valued at $450.00, and also the unlawful use of said automobile.

Upon his arraignment, he was not advised by the Police Justice or any person attached to the Court that he had a right to obtain counsel or have counsel assigned to defend him and pleaded guilty to the charge in the complaint. Petitioner was thereupon held to the then pending term of the County Court in the sum of Five Thousand Dollars ($5,000) bail and committed to the custody of the Sheriff, being unable to furnish bail.

On August 22nd, 1945, an information was filed in the County Court of Richland County by the District Attorney charging petitioner with two crimes in two separate counts: Larceny of an automobile of the value of Four Hundred Fifty ($450.00) Dollars, property of another; unlawful use of an automobile belonging to Robert Banta, without first obtaining the consent of the owner.

On August 22nd, 1945, the same day the information was filed, petitioner was arraigned before the County Judge upon the aforesaid Information which charged two separate felonies in two separate counts.

At the time appellant was arraigned before the County Judge, the Judge did not inform him of his right to secure counsel, or have counsel assigned to defend him if he was unable to secure his own counsel as required by Section 357.26(2) of the Wisconsin Statutes.

The charge was read to him and he pleaded guilty to both counts of the Information, for he believed that since the person arrested with him, KEITH DOBBS, had taken the automobile without permission of the owner, and since he was with him at the time the automobile was taken, he was guilty, even though at the time this automobile was taken by the said KEITH DOBBS, he did not know it had been taken without the owner's permission.

That prior to his arrest in this case he had never before been convicted of a crime.

That he was in the Army and was discharged in 1943.

That in 1945 he was confined in the Kings Park Hospital for Mental Diseases, Kings Park, Long Island, New

York, and was released on parole from that Institution in May, 1945.

That he did not steal the automobile and at the time he entered the automobile he did not know that KEITH DOBBS was taking the automobile without permission of the owner, and only discovered this fact after his arrest.

That the Court failed to advise appellant of his right to secure counsel or have counsel assigned to defend him if he was unable to secure his own counsel as expressly provided by Section 357.26(2) of the Wisconsin Code.

That he was never advised by anyone that he had a right to communicate with relatives or friends all of whom resided in the State of New York.

That he was ignorant of the law and what acts on his part would make him guilty of the crimes set out in the Information.

That the Court made no inquiry into the facts prior to the acceptance of the plea of guilty to ascertain whether petitioner, who stood before the Court, without counsel, relatives or friends, was guilty in fact of the charges in the Information.

That the Court made no inquiry of any nature between the time the plea of guilty was entered and sentence and took no testimony either sworn or unsworn, but forthwith sentenced appellant to serve one to three years at Waupun State Prison on each count of the Information, each sentence to run consecutively.

That this sentence was subsequently changed after appellant was taken to prison to run concurrently.

The first answer of the District Attorney in reply to the affidavit of petitioner states that the petition of appellant fails to state errors of fact of sufficient magnitude to constitute grounds for the granting of the Writ and that the granting of the Writ would be contrary to law and would in effect, release a person admittedly guilty of the crime charged in the Information.

The second answer of the District Attorney consists of his own affidavit wherein he states that appellant understood the charges placed against him and previously admitted his guilt to the Sheriff in his presence. That the record is silent as to whether or not the said appellant was advised of his constitutional right to be represented by counsel and that because of the death of the Judge, he is unable to furnish affidavits concerning the true facts of said matter, but he alleges specifically that the appellant was well acquainted with the charges placed against him, understood them thoroughly and entered his plea of guilty to the charges contained in the Information willingly and that his guilt was freely admitted in open Court.

That the remedy sought to be used to obtain the relief requested by petitioner is not the proper remedy under the laws of the State of Wisconsin in that the petition fails to disclose any errors in facts or omission of facts existing before judgment but for which error the judgment would not have been entered.

The affidavit of J. B. McCLAREN, in opposition to the motion, states that he questioned appellant and from such questioning he learned and it was admitted by petitioner that the petitioner was the instigator in the taking and operating the motor vehicle without the owner's con-

sent and that the minor, KEITH DOBBS, went along with petitioner at the request of appellant on his promise he would finance him on a trip to the East. That he does not recall specifically of advising this particular petitioner of his right to communicate with relatives or friends, he does state that it was a matter of general practice with him in all cases of persons being confined under warrant of arrest to advise them of their rights and that he believes that the petitioner was so advised in this case. That the appellant had been arrested on other occasions, one of them being in Richland County, and that he knew the law of this State concerning the taking of an automobile. That this complaint was also based on such a charge, but that the owner of the car did not prosecute. That the appellant had previously been arrested on suspicion of stealing an automobile in the State of New York, all of which was prior to the 18th day of August, 1945.

That he was present in Court when the petitioner was arraigned in the County Court for Richland County, Wisconsin, but he cannot definitely recall whether or not the Court did advise the petitioner of his right to counsel, but that the defendant repeatedly informed him of facts indicating his guilt to both charges contained in the Information and upon his arraignment did plead guilty to such charges.

POINT I

"THE WRIT OF ERROR *CORAM NOBIS* IS THE PROPER REMEDY AND THE ONLY REMEDY AVAILABLE TO PETITIONER TO DETERMINE WHETHER HE WAS DENIED DUE PROCESS OF LAW."

The petitioner moved in the County Court of Richland County for a writ of error *coram nobis* to set aside his conviction and sentence upon the ground that failure of the Court to inform him as to his right to counsel as provided by Sec. 357.26(2) of the Wisconsin Statutes, failure of the Court to conduct any inquiry into the facts before or after the plea to ascertain whether in fact defendant was guilty of the two crimes contained in the Information to which he pleaded guilty and failure of the Court to warn the defendant of the consequences of the two pleas of guilty that he entered, constituted a deprivation of defendant's rights under the 14th Amendment of the Constitution of the United States; the Statutes of Wisconsin and the Constitution of Wisconsin.

The Supreme Court of Wisconsin in affirming the order of the Circuit Court for Richland County denying a motion for a writ of error *coram nobis* stated that a writ of error *coram nobis* did not lie, as in their opinion, *habeas corpus* affords a proper and complete remedy.

The common law writ of error *coram nobis* is still in force in the State of Wisconsin.

Ernst v. State, 179 Wis. 646, 650, 192 N. W. 65, 67.

It is true that *habeas corpus* will lie to review the questions raised on this motion.

But before *habeas corpus* will issue it must affirmatively appear in a verified petition that the person seeking the issuance of a writ of *habeas corpus* is imprisoned and restrained of his liberty, that the cause of his restraint, whether it be a commitment of a Court or otherwise, is to be inquired into to determine the legality thereof.

The petitioner herein was sentenced August 22nd, 1945 to Waupun State Prison. He was released on parole December 12, 1946. He returned to New York and parole supervision was continued there. May 29, 1947 he was indicted in the Queens County Court, New York on a charge of grand larceny, 1st degree, committed April 22, 1947. May 14, 1947 his Wisconsin parole was revoked. November 20, 1947 he pleaded guilty to an attempt to commit the crime of grand larceny in the second degree. He was sentenced to a term of two to four years in Sing Sing Prison.

The maximum sentence for a first offender for an attempt to commit grand larceny in the second degree in New York State is not less than one year and three months to not more than two years and six months. Petitioner was sentenced as a second offender, his previous conviction, being the one in the County Court of Richland County, the subject matter of this application. As a second offender he received an increased sentence of not less than two years to not more than four years. He was released on parole May 11, 1949 from Sing Sing Prison. His Wisconsin parole was reinstated.

He is now again in Sing Sing prison for a violation of parole and is serving his sentence of two to four years imposed by the Queens County Court.

Since this appeal to the Supreme Court was decided petitioner was given an absolute discharge by the Parole Board of Wisconsin, so that Board retains no jurisdiction of any nature over petitioner.

The decision of the Supreme Court of Wisconsin further states:

> "For practical reasons the applicant should subject himself to the jurisdiction of the Wisconsin Courts so that if he is entitled to a new trial he will be available when it is ordered. He has it within his power to surrender himself to the Sheriff and sue out a writ of *habeas corpus.*"

The statement in the opinion that the petitioner has it within his power to surrender himself to the Sheriff and sue out a writ of habeas corpus is meaningless.

It must be apparent that the petitioner can do no such thing.

Petitioner cannot insist on a Sheriff putting him in jail, and having the records show he is being deprived of his liberty by reason of the illegal sentence imposed in the County Court of Richland County August 22nd, 1945.

Does it mean that petitioner must go to the County Court of Richland County and make a motion before that Court to be sent back to prison on the sentence heretofore imposed August 22nd, 1945, and if the Judge should refuse, appeal his denial of the motion to the Supreme Court?

The County Court has no jurisdiction to again commit the petitioner to prison.

No prison would take the petitioner from the Sheriff without a proper commitment from a Court of competent jurisdiction.

No Sheriff would take and hold petitioner solely on his own request that he be imprisoned until such time as petitioner could apply for a writ of *habeas corpus.*

No Court could order a Sheriff to imprison petitioner for the sole purpose of giving petitioner an opportunity to apply for a writ of *habeas corpus.*

Petitioner could not truly state in his petition for a writ of *habeas corpus* that he is imprisoned and restrained of his liberty by virtue of a sentence imposed on a conviction had in the County Court of Richland County on August 22nd, 1945.

Statutes of Wisconsin,
Habeas Corpus,
Sec. 292.01

> Every person restrained of his liberty, except in the cases specified in Sec. 292.02 may prosecute a writ of *habeas corpus* to obtain relief from such restraint.

The only authority to hold petitioner in prison was the Parole Board. That Board had already given petitioner an absolute discharge effective July 7th, 1949, before the decision was handed down by the Supreme Court of Wisconsin affirming the lower court decision, though petitioner was not informed of this until some time in October, 1949.

The statement of the Supreme Court of Wisconsin that the petitioner should submit himself to the jurisdiction of the Wisconsin courts is neither practical nor reasonable, and this is well established by the foregoing argument.

The writ of error *coram nobis* is a part of the law of the State of Wisconsin, excepting where other remedies have been substituted.

Ernst v. State, 179 Wis. 646; 192 N. W. 65.

The writ of *habeas corpus* has not been substituted for the writ of error *coram nobis* in a situation such as appears here.

In *Ernst v. State* (supra) petitioner claimed he was a foreigner, not conversant with the English language, he was fraudulently induced to plead guilty, not knowing or comprehending the meaning of such plea, and that the facts with reference thereto were unknown to the Court and were withheld from the Court. The Court held that in such a situation, the fraud not appearing on the record, an ordinary writ of error would not lie, so that recourse must be had to other writs of error. The Supreme Court denied the writ only on the ground that the remedy lies in the trial Court.

Accordingly, the trial Court took jurisdiction.

Ernst v. State, 188 Wis. 155; 193 N. W. 978.

The motion for a writ of error *coram nobis* was decided by the trial court on affidavits and sworn statements submitted by both sides. The motion for the writ was denied. On appeal to the Supreme Court, that Court reviewed the evidence adduced before the trial court and in affirming

the decision of the trial court held there was no abuse of discretion in denying the writ. Ernst was in jail during all these proceedings. He was not relegated to the remedy of the writ of *habeas corpus*.

In *Gelosi v. State*, 218 Wis. 289, 260 N. W. 442, the Supreme Court of Wisconsin said:

> "The writ of error *coram nobis* is still in force in this State, as a common law remedy, excepting only where other remedies are provided by statute."

In *Estate of Cudahy*, 196 Wis. at p. 263, (219 N. W. at p. 204), the Supreme Court of Wisconsin stated that a judgment rendered without jurisdiction may be opened up at any time. This doctrine was laid down in a civil case but it is of universal acceptance and applies in criminal cases.

In *State v. Wagner*, 232 Wis. 138, 286 N. W. 544, appellant was arrested August 12, 1937, on charge of carrying a concealed and dangerous weapon. The appellant was brought before the Superior Court the following morning, August 13, 1937. Appellant entered a plea of guilty, whereupon the court adjudged him guilty, imposed a fine of $100.00 and costs or in default of payment of fine and costs, to be committed to the County Jail for a period not to exceed three months. The fine and costs were paid. On August 26, 1937 appellant made a motion to set aside the judgment and sentence of the court and for the return of the fine and costs. The record discloses no disposition of this motion. On March 12, 1938, appellant filed a verified petition for a writ of error *coram nobis*. With the petition appellant filed an affidavit. The affidavit stated he was before the Superior Court, Dane County, on a complaint for carrying concealed weapons and the records in the case

set forth he pleaded guilty and was found guilty, and duly sentenced thereon. That at all times before and after his conviction the facts are that he denied ownership and possession of the weapon and denied his guilt. That the proceedings were had in chambers and that the clerk should have entered a plea of not guilty.

The State filed counter-affidavits by persons who were present at the time of petitioner's arraignment.

A hearing was had on appellant's application for a writ of error *coram nobis* on April 22, 1938. The application for the writ was denied.

On appeal to the Supreme Court of Wisconsin, the Court reviewed the evidence before the trial court and decided that no error was committed by the trial court in denying the petition for the writ of error *coram nobis*.

Nowhere in the opinion is there a statement that the writ of error *coram nobis* would not lie. Wagner, the petitioner was not in custody. The Supreme Court did not then state that the writ of *habeas corpus* is a complete remedy. The claim in the petition of Wagner that he did not plead guilty went to the jurisdiction of the trial court to impose sentence.

The Supreme Court reviewed the evidence before the trial court and found as a fact that there was no abuse of discretion by that court in denying the petition for the writ of error *coram nobis*.

In *State ex rel. Doxtater v. Murphy*, 248 Wis. 593, 22 N. W. 2nd 685, 689, the Court denied a petition for a writ of *habeas corpus* solely on the ground that petitioner still had his remedy by appeal, the time to appeal not having

expired. The precise question involved in this case was raised there and the Court said:

> "This amendment became effective July 17, 1945 but had not yet come to the attention of the trial Court at the time of the hearing in this case. The trial Court was clearly in error in failing to advise the defendant of his rights. The defendant, the petitioner took no appeal from the judgment and sentence of the Court. If such an appeal had been taken undoubtedly error would have been confessed and the case remanded to the trial court." * * * In this case the trial court had jurisdiction to sentence the defendant, but committed jurisdictional error in failing to advise the defendant of his right to assistance by counsel. The petitioner had and has a complete and adequate remedy by way of appeal or writ of error. Therefore, he is not entitled to a remedy by way of a writ of habeas corpus and his petition must be denied."

In the case just stated, the defendant sued out a writ of *habeas corpus* alleging that the provisions of Sec. 357.26(2) requiring a trial court to inform him of his rights to counsel have not been complied with. The Supreme Court of the State of Wisconsin, calling attention to the fact that this statute had only been newly enacted and had not yet come to the attention of the trial court, stated that if the defendant had proceeded by appeal, error would undoubtedly have been confessed. It went on to hold, however, that since the time to appeal had not yet expired, *habeas corpus* was not the proper remedy since "the petitioner had and has a complete and adequate remedy by way of appeal."

In the case at bar, the right to appeal has long since expired and the remedy of *habeas corpus* is unavailable

for the very simple reason that the defendant was not and is not restrained of his liberty in the State of Wisconsin. Consequently, it is obvious that the remedy by way of the writ of error *coram nobis* is the only one open to the defendant.

In *Ernst v. State,* 179 Wis. 646, 192 N. W. 65, the Court unequivocally stated that the common law writ of error *coram nobis* still is the law in Wisconsin and could be used where no other remedy exists and reiterated the old common law maxim "Whenever there is a *wrong,* a remedy."

> "It will therefore be seen that, while the functions of the writs have been enlarged in some instances, and while in others the proceedings in vogue at common law have been regulated, modified and changed so as to meet with and conform to modern conditions and affairs, the protecting features involved in the original common law remedies are still intact, and the designed relief embraced in the original forms are still available under our modern practice, serving the purpose of protecting certain fundamental and inalienable rights with respect to life, liberty and property, and affording pursuant to the common law maxim whenever there is a wrong, a remedy."

The petitioner cannot appeal, nor can he apply for the ordinary writ of error as the statute of limitations has run against him.

Statutes of Wisconsin
Appeals in Criminal Cases:
Sec. 358.13:

> The time within which a writ of error may be issued or an appeal taken to obtain a review by the Supreme

Court of any judgment or order in any criminal case is limited to one year from the date of entry of such judgment or order.

He cannot pursue the remedy of the writ of *habeas corpus* for the reasons aforesaid.

The only remedy left, if there is one, is the writ of error *coram nobis*.

The petitioner could not collaterally raise the question of a denial of due process in the Queens County Court by reason of his conviction in the County Court of Richland County, State of Wisconsin, had in violation of the provisions of Sec. 357.26(2); the constitutional provisions of the Constitution of the State of Wisconsin and the 14th Amendment of the Constitution of the United States.

POINT II

PETITIONER HAS PROVED BY A PREPONDERANCE OF EVIDENCE HE IS ENTITLED TO A WRIT OF ERROR *CORAM NOBIS*.

The trial court heard this motion for the issuance of a writ of error *coram nobis* on affidavits submitted by both sides. The trial court had the right to follow this procedure.

State v. Dingman, 239 Wis. 188; 300 N. W. 244.

The verified affidavit of petitioner established:

(1) He was not informed by the Court of his right to counsel and such advice was not recorded as required by Sec. 357.26(2) Wisconsin Statutes.

This allegation is not controverted by the answering affidavits of the District Attorney in opposition.

(2) He was never advised by anyone that he had a right to communicate with relatives or friends all of whom reside in the State of New York.

The answering affidavit of J. B. McClaren, then Sheriff, states he does not specifically recall advising this particular defendant of his right to communicate with relatives or friends. He does state it was a matter of general practice with him in all cases of persons being confined under warrant of arrest to so inform them of their rights and that he believes that the defendant was so advised.

There is no statement anywhere in any affidavit that any person in either the Police Justice Court on his arraignment August 20th, 1945 or in the County Court on his arraignment on the Information filed by the District Attorney August 22nd, 1945 informed him of these rights.

(3) That he did not steal the automobile and at the time he entered the automobile he did not know that KEITH DOBBS was taking the automobile without permission of the owner and only discovered this fact after his arrest.

The answering affidavits of the District Attorney recite conclusions and fail to state any facts from which a Court could infer that the statements alleged to have been made by the petitioner constituted admissions of guilt.

(4) That he was ignorant of the law and what acts on his part would make him guilty of the crimes set out in the Information.

The answering affidavits state that that defendant was well acquainted with the charges placed against him and understood them thoroughly. (Affidavit of Leo P. Lownik, District Attorney.) Again the answering affidavit states nothing but conclusions, and is bare of facts.

(5) That the trial Court made no inquiry of any nature prior to the acceptance of the plea of guilty by the petitioner so that the court could determine whether *in fact* petitioner was guilty of the two crimes in the Information before the Court accepted the plea.

This allegation is uncontroverted.

(6) That the trial court made no inquiry between the time the plea of guilty was entered to the two counts of the Information and the imposition of sentence, but forthwith sentenced the petitioner to serve one to three years in Waupun State Prison each sentence to run consecutively.

This allegation is uncontroverted.

Even in the absence of the statute, Sec. 357.26(2), the petitioner has established by a preponderance of evidence that this whole proceeding is so permeated with unfairness that there is a complete lack of fundamental justice. The information charges two separate and distinct felonies:

(1) Violation of Section 343.17 of the Wisconsin Statute, Larceny by stealing the property of another.

(2) Violation of Section 343.18, Operation of motor vehicle without owner's consent.

These two statutes are separate and distinct substantive crimes and there are distinct elements constituting the crime defined in one section which are not included in the definition of the other, so that while a person may be guilty of violating one section, it may very well be that the proof will establish that he has not violated both.

Schroeder v. State, 222 Wis. 251; 267 N. W. 899.

If the court had made an inquiry into the facts in this case, it may very well be that these facts would have only spelled out a violation of Sec. 343.17 of the Statutes. If the court had made inquiry as to the value of the automobile, it may very well be that such value would not have exceeded $100.00 and had been more than $20.00.

Section 343.17 provides that if the value of the stolen property shall not exceed $100.00 and shall exceed $20.00, he shall be punished by imprisonment in the State prison or County Jail not more than one year nor less than six months or by a fine not exceeding $200.00.

These distinctions are a closed book to the average layman. He cannot determine himself if the indictment is good or bad.

He may be convicted by a plea of guilty where the evidence if inquired into by the Court will disclose that he was in fact not guilty of the crimes charged in the Information.

The evidence that could be given, but was not, might very well be incompetent, or irrelevant to the issues.

These observations are as pertinent in connection with an accused's plea as they are in the conduct of a trial.

Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate.

These are the reasons why the right to counsel is "fundamental."

It must be apparent that an examination of the evidence adduced by both sides in the trial court will show that petitioner established by a fair preponderance of evidence that he was denied due process as required by the Fourteenth Amendment of the Constitution of the United States for the reason that the failure of the trial court to conduct an examination into the facts to determine whether petitioner was guilty under one count of the Information or both, and to inquire into the true value of the property claimed to have been stolen injected such unfairness into the proceedings that it cannot be denied that such unfairness actively operated in the process that resulted in his imprisonment.

This Court has stated that its sole concern is with a claim that the record of any case fails to show a compliance with the Fourteenth Amendment insofar as the Due Process Clause of that amendment requires an accused to have the benefit of counsel, and that the due process of law which the Fourteenth Amendment exacts from the States is a conception of fundamental justice.

Williams v. Kaiser, 323 U. S. 471;

Foster v. Illinois, 332 U. S. 134;

DeMeerleer v. Michigan, 329 U. S. 663.

CONCLUSION

The decisions of the Supreme Court and the Circuit Court of the County of Richland, State of Wisconsin are incorrect; the petition for a writ of *coram nobis* is still the law in the State of Wisconsin and the only remedy available to petitioner and the petitioner has established by a preponderance of evidence that he is entitled to the writ of *coram nobis*. It is therefore respectfully submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

No....., October Term, 1949.

WILLIAM TURPIN, JR.,
Petitioner,

vs.

STATE OF WISCONSIN

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 9th, 1949.

(SIGNED) FRED M. VINSON
Chief Justice of the United States.

Dated this 5th
day of October, 1949.

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In The

Supreme Court of the United States

October Term, 1949

No.....

WILLIAM TURPIN, JR.,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

I. OPINION OF THE COURT BELOW.

The opinion of the supreme court of Wisconsin is set forth in the petition for the writ of *certiorari* at pages 4 to 8 and also in the transcript of the record at pages 19 to 21. It is reported in 255 Wis. 358, 38 N. W. 2d 495.

II. JURISDICTION.

Respondent opposes the granting of a writ of *certiorari* on the grounds that the case is moot and that no federal question is presented.

III. NATURE OF THE CASE.

Petitioner seeks review of a judgment of the supreme court of Wisconsin affirming an order of the circuit court for Richland county, Wisconsin, in the criminal case of *State of Wisconsin v. William Turpin, Jr.*, denying the petitioner's applicant for a writ of error *coram nobis*.

The opinion below holds that the writ of *habeas corpus* affords a proper remedy to raise the question whether the defendant was denied due process of law by the failure to appoint an attorney to represent him or to advise him of his right to such appointment. It holds further that the writ of error *coram nobis* is not a proper remedy to raise that question.

The decision of the Wisconsin supreme court was filed July 12, 1949. Unknown to the petitioner and to counsel on either side of the case, on July 6, 1949 the petitioner's sentence expired by reason of credit for "good time" pursuant to the applicable Wisconsin statute, and the Wisconsin state department of public welfare issued him a final discharge from parole (petitioner's brief p. 17).

IV. STATEMENT OF FACTS.

On August 22, 1945 the petitioner was convicted on his plea of guilty in the county court for Richland county, Wisconsin, of charges of larceny of an automobile and of operating an automobile without the owner's consent, and was sentenced to two consecutive terms of not less than one nor more than three years in the state prison at Waupun, Wisconsin. The record does not disclose that the court advised him, prior to his plea of guilty, of his right to ap-

pear by counsel and to have counsel appointed for him at the expense of the state (R. 4, 6).

On July 17, 1946, upon the application of petitioner, Honorable Walter S. Goodland, Governor of Wisconsin, made an order commuting the said two sentences to run concurrently instead of consecutively (R. 6-7).

A motion for a writ of error *coram nobis* returnable December 7, 1948 was made by counsel for petitioner. Attached to the motion was the affidavit of petitioner sworn to in Westchester county, New York, on November 26, 1948 (R. 8-10). Issue was joined on this motion and the matter was transferred to the circuit court where it was heard on affidavits. Honorable A. W. Kopp, circuit judge, made and filed his decision denying the motion for the writ of error *coram nobis* on January 4, 1949 (R. 15-16) and on January 19, 1949 a formal order denying the motion was entered (R. 16-17).

The records of the state department of public welfare, of which the Wisconsin supreme court takes judicial notice, showed that the defendant was released on parole from the state prison on December 12, 1946 and was permitted to go to New York for supervision pursuant to the interstate compact for out-of-state parolee supervision, section 57.13, Wisconsin Statutes 1945, to which the states of New York and Wisconsin are both signatories. While being supervised in New York, defendant was indicted in Queens county, New York, on May 29, 1947 on a charge of grand larceny in the first degree committed April 22, 1947. On May 14, 1947 his Wisconsin parole was revoked. On November 20, 1947 he pleaded guilty in the Queens county court to an information charging attempted grand larceny in the second degree was sentenced to 2 to 4 years in the

state prison. He was released from Sing Sing Prison on May 11, 1949 on parole, at which time his Wisconsin parole was reinstated and supervision by the New York parole authorities on behalf of Wisconsin was resumed jointly with supervision on his New York parole. It therefore appears that petitioner was serving a New York sentence in Sing Sing Prison at the time that he made the petition for the writ of error *coram nobis* in the county court for Richland county, Wisconsin.

On July 6, 1949 the state department of public welfare of Wisconsin discharged petitioner from parole by reason of the expiration of his Wisconsin sentence, and the state of Wisconsin has no further interest in the petitioner. It is asserted in petitioner's brief (p. 17) that he is now again in Sing Sing Prison for a violation of parole and is serving his sentence of 2 to 4 years imposed by the Queens county court. As to this the undersigned have no knowledge.

V. ARGUMENT.

A. THIS COURT DOES NOT DECIDE MOOT OR ABSTRACT QUESTIONS OF LAW ON REVIEW OF DECISIONS OF STATE COURTS.

As pointed out in the statement of facts, the petitioner has been discharged from his Wisconsin parole and the state of Wisconsin has no further interest in him by reason of his 1945 conviction in the Richland county court. He may return to Wisconsin as soon as his obligations to the state of New York are satisfied, knock on the gates of the Wisconsin state prison and he will not be admitted. He may submit himself to supervision by Wisconsin parole authori-

ties and he will be rejected. He may submit monthly reports to his Wisconsin parole officer and they will be sent back. Wisconsin is absolutely through with the petitioner. Unless he returns and commits further crimes in Wisconsin, his future is a matter of profound indifference to the respondent. Wisconsin is not now depriving him of liberty either with or without due process of law.

It follows that there is no longer any controversy between the petitioner and respondent which is capable of judicial determination; that the case is therefore moot; and that this court will not review it on *certiorari*.

> *Chandler v. Wise*, (1939) 307 U. S. 474, 59 S. Ct. 992, 83 L. ed. 1407, and cases cited below.

It is true that the fact which makes the case moot does not appear of record, but it is established that such fact may be shown by statements of counsel *dehors* the record.

> *Buck's Stove and Range Co. v. American Federation of Labor*, (1911) 219 U. S. 581, 31 S. Ct. 492, 55 L. ed. 345.

There is some suggestion in petitioner's brief, p. 16, that his Wisconsin conviction increased the penalty which was imposed upon him by the Queen's county court for his subsequent offense, on the ground that it made him a second offender. Counsel do not state how he could get his New York sentence reduced if the Wisconsin conviction were to be set aside upon a writ of error *coram nobis*. But even assuming that some remedy exists in the state of New York for obtaining such reduction of his New York sentence, that would not be sufficient to give this court jurisdiction of an otherwise moot case. This court has held

that it will not decide a moot case even though the judgment appealed from may bind the petitioner as a determination of his or her status.

> *Kimball v. Kimball,* (1899) 174 U. S. 158, 163, 19 S. Ct. 639, 43 L. ed. 932, 934.

And the same rule has been applied by this court where it was claimed that the judgment below was being relied on as *res adjudicata* in another suit between the parties.

> *American Book Co. v. Kansas,* (1904) 193 U. S.49, 52, 24 S. Ct. 397, 48 L. ed. 613, 614.

It is therefore respectfully submitted that the petition be denied on the ground that the case is moot.

B. QUESTION OF STATE PROCEDURAL LAW ONLY IS PRESENTED.

The petitioner's position amounts to this: That the state of Wisconsin is bound not only to afford him some remedy to vindicate his alleged federal right, but that it must afford him a remedy in the form selected by him, namely the writ of error *coram nobis.*

It need hardly be pointed out here that the question sought to be raised by petitioner in the state court scarcely fits the calls of the common-law writ of error *coram nobis* as preserved in the state of Wisconsin. The reasons are amply stated in the opinion of the court below. Some few states have expanded the function of the writ to include such cases, but respondent has not.

In Wisconsin, after the time for appeal has expired, the question may be raised by a writ of *habeas corpus*. See cases cited in opinion below.

It is true that the petitioner cannot avail himself of the *habeas corpus* remedy for the reason that he is not and was not in custody in the state of Wisconsin. This was due to his own act. He first treated his conviction and sentence as valid by applying to the governor for executive clemency, which he received in the form of a commutation of his sentence. He next treated his Wisconsin sentence as valid by applying for and receiving parole. As a further act of grace, the state of Wisconsin permitted him to return for parole supervision to his home state of New York. While there he committed a further crime, to which he pleaded guilty and for which he was sentenced to Sing Sing Prison. It was this combination of circumstances which put beyond his reach the remedy afforded by the state of Wisconsin by a writ of *habeas corpus*.

Moreover, we do not understand that this court has ever held that it is an absolute duty that the state furnish a remedy whereby a prisoner may raise the federal question sought to be raised here. If the state fails to furnish such a remedy, the only consequence is that the prisoner may then resort to the federal district court for the relief to which he claims to be entitled.

> *Ex parte Hawk,* (1944) 321 U. S. 114, 64 S. Ct. 448, 88 L. ed. 572.

It is therefore apparent that the decision below rests upon an adequate nonfederal ground. The federal question

sought to be raised was not even considered by the court below.

It is therefore submitted that the writ of *certiorari* should be denied for the foregoing reasons.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1949.

No. 469

WILLIAM TURPIN, JR.,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

Reply to Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

WILLIAM TURPIN, JR., *Petitioner,* v. STATE OF WISCONSIN, *Respondent.*	No.....

Reply to Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin.

The petitioner herein, replying to the brief submitted in opposition to petition for a writ of certiorari in the above entitled matter, with respect to Paragraph V—Argument:

> "A. This Court does not decide moot or abstract questions of law on review of decisions of State Courts."

urges that this is not a moot question. The petitioner is now in prison serving a sentence as a second offender for the reason that the illegal conviction had August 22nd, 1945, in the County Court of Richland County, Wisconsin, increased the punishment on his conviction in the Queens County Court of New York.

The conviction in the County Court of Richland County, Wisconsin, could not be attacked collaterally in the Queens County Court of New York, and to all intents and purposes was a valid conviction and the County Court was

compelled to treat it as such at the time of imposition of sentence.

> *The People of the State of New York,* Respondent v. *Basil McCullough,* Appellant; Decided December 2nd, 1949 (Not Reported) Law Journal, New York, December 30th, 1949 (and cases cited therein).

Petitioner replying to Paragraph B.

> "Question of State procedural law is presented."

urges that petitioner does not take the position that the State of Wisconsin must afford him a remedy in the form selected by petitioner.

The Attorney General of the State of Wisconsin takes the position that the petitioner could not avail himself of the writ of habeas corpus for the reason that he is not now, and was not at the commencement of this proceeding in the County Court of Richland County, Wisconsin, within the State of Wisconsin in legal custody.

Petitioner could not sue out a writ of error or appeal for the time to commence such proceedings is governed by statute and had expired.

> Statutes of Wisconsin:
> Appeals in criminal cases; Sec. 358.13.

The only remedy left to petitioner was a petition for a writ of error *coram nobis.*

The Supreme Court of Wisconsin, in its opinion, states that habeas corpus affords a complete remedy. It is apparent that the petitioner has no such remedy for the reason that he is not restrained of his liberty in the State of Wisconsin, and was not so restrained at the commencement of this proceeding in the County Court of Richland County, Wisconsin.

> Statutes of Wisconsin:
> Habeas Corpus, Sec. 292.01.

The Attorney General of the State of Wisconsin, in his brief submitted in opposition to this petition, takes the position that petitioner could not resort to habeas corpus for relief (p. 7).

The Attorney General states that the question sought to be raised by the petitioner cannot be raised by the common law writ of error *coram nobis* (p. 6).

If this statement of the Attorney General is correct then the State of Wisconsin provides no mode for redressing the wrong suffered by petitioner, and in such case this Court will take jurisdiction to inquire into whether the petitioner has been denied counsel or the assistance of counsel under circumstances which constitute an infringement of the United States Constitution.

> *Carter* v. *Illinois,* 329 U. S. 173, 176;
> *Ex parte Hawk,* 321 U. S. 114;
> *House* v. *Mayo,* 324 U. S. 42.

The Supreme Court of the State of Wisconsin, in its opinion, bases its refusal to reverse the decision of the Circuit Court upon insubstantial and insufficient grounds. The opinion discloses that the Court considered the federal question raised by the petitioner.

> "Assuming, without deciding, that the defendant's rights were violated by the acceptance of the plea of guilty without first appointing counsel or having a waiver, we are of the opinion that a writ of error *coram nobis* is not a proper remedy."

In talking about "defendant's rights" the Court considered the rights of petitioner under the Fourteenth Amendment of the Constitution of the United States, as well as his rights under the laws and the Constitution of the State of Wisconsin.

It is well settled that where the independent grounds upon which a case is decided is not a substantial or suffi-

cient one, it will be presumed that the State Court based its judgment on the law raising the federal question and the United States Supreme Court will then take jurisdiction.

The opinion of the Supreme Court of Wisconsin, stating that the writ of habeas corpus affords this petitioner a complete remedy in this case is meaningless, for an examination of the facts, together with an examination of the law relating to the issuance of writs of habeas corpus will disclose that the petitioner could not petition the Supreme Court of the State of Wisconsin for the issuance of a writ of habeas corpus for the reason that he was not deprived of his liberty within the State of Wisconsin at the commencement of this proceeding.

Klinger v. *Missouri*, 13 Wall. 257, 263;
Wood Mowing & Reaping Machine Co. v. *Skinner*, 139 U. S. 293, 297;
Allen v. *Arguimbau*, 198 U. S. 149;
Lynch v. *New York*, 293 U. S. 52.

The United States Supreme Court may issue certiorari to review the questions raised on this application.

Powell v. *Anderson*, 287 U. S. 45.

Respectfully submitted,

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